C/M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NOT FOR PUBLICATION

JAMES ELLIS,

Petitioner,

-against-

DAVID MILLER, Superintendent,
Eastern Correctional Facility,

Respondent.

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MEMORANDUM
AND ORDER
97-CV-7049 (JG)

APPEARANCES:

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Petitioner Pro Se

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JOHN GLEESON, United States District Judge:

James Ellis petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging a judgment of the Supreme Court of the State of New York, Kings County,

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that found him guilty of Manslaughter in the First Degree (N.Y. Penal Law § 125.20[1]), Assault in the First Degree (N.Y. Penal Law § 120.10[1]), Assault in the Second Degree (N.Y. Penal Law §120.05[2]), and Criminal Possession of a Weapon in the Fourth Degree (N.Y. Penal Law § 265.01[2]). Petitioner was sentenced to consecutive terms of imprisonment of eight and one-third to twenty-five years on the manslaughter count, five to fifteen years on the first-degree assault count, and two and one-third to seven years on the second-degree assault count. He was also sentenced to a term of imprisonment of one year on the weapon possession count to be served concurrently with the other sentences. Petitioner is currently incarcerated pursuant to that judgment.

In his petition, Ellis claims that (1) the trial court lacked jurisdiction over the count of Assault in the First Degree; (2) the People failed to disprove beyond a reasonable doubt that his acts were not justified; (3) there was insufficient evidence to prove that Maurice Small suffered serious physical injury; and (4) he was denied his constitutional right to a lesser included charge of Reckless Assault in the Third Degree.

For the reasons set below, the petition is denied.

FACTS

On December 22, 1992, petitioner stabbed his girlfriend, Linda Poole, in the chest, back, and arm, in the apartment of his sister, Marietta Small, where he was then residing. Thereafter, petitioner stabbed his sister's husband, Conward Small, in the chest, and stabbed Conward's son, Maurice Small, in the left upper forearm. Poole survived the attack and testified at trial. Conward Small suffered a perforated lung and died as a result of his knife wound. Maurice Small received forty stitches for his wound. At the time of trial, approximately nine

months later, he still had a scar from the wound, and the area that had been injured hurt when he lifted heavy things.

A. The People's Case

Early on the morning of December 22, 1992, petitioner unlocked the door to Poole's bedroom with a knife. He then went into Maurice's room, which he was sharing at the time, and kneeled next to a duffel bag. As Poole walked down the hallway past petitioner, he grabbed her from behind, put his arms around her, and stabbed her in the chest, arm and back. Marietta was awakened by Poole's screaming that she had been stabbed. Marietta and Conward went to the hallway and Marietta took Poole to Marietta's bedroom, leaving Conward and petitioner alone in the living room. Maurice was awakened by the screaming, and when he entered the hallway, he saw his father going toward petitioner with a blackjack.[1] Maurice could not see if petitioner was holding anything. Maurice returned to his bedroom to get his baseball bat.

Petitioner came out of the kitchen with a knife and approached Conward, who was standing in the hallway. Conward placed his hands against the walls in an effort to stop petitioner from going to the rear of the apartment, where Poole was located. Petitioner, facing Conward, raised his arm and thrust the knife into Conward's chest. As Maurice ran to catch his falling father, petitioner stabbed Maurice in the left upper forearm. Maurice then hit petitioner with the bat a number of times, but eventually dropped the bat because his arm hurt. Petitioner

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[1] Petitioner claimed Conward was holding a shovel. A lab report from the medical Examiner's Office noted that blood stains on the handle of a shovel recovered from the Smalls' apartment were consistent with Conward's blood.

picked up the bat while Maurice went to help his father. Before leaving the apartment, petitioner hit Poole in the head with the bat.

B. The Defense Case

According to petitioner, early on the morning of December 22, 1992, he unlocked Poole's bedroom door with a butter knife. He sat down on Poole's bed and noticed a paring knife on the bed.[2] This caused him to think of Poole's previous suicide attempt. Petitioner picked up the paring knife and went to Maurice's room to turn off the light and close the door. After turning off the light, petitioner pulled Poole toward him, facing her back, to let her know that he cared. With his arms wrapped around her, petitioner pushed Poole into the kitchen and threw the knife to the floor. Petitioner testified at trial that it was not until Marietta took Poole from the kitchen to Marietta's bedroom that he realized he had stabbed Poole.

Petitioner claimed that as Marietta was taking Poole to the back of the apartment, Conward and Maurice approached him, as he was standing in the entranceway of the kitchen. Conward was carrying a shovel and Maurice was carrying a bat. Petitioner thought Conward and Maurice were going to hurt him, so he picked up a knife from the kitchen counter in order to protect himself. When petitioner tried to walk past Conward, Conward pushed petitioner back with his shoulder and then lifted the shovel over his head. As Conward leaned forward to strike petitioner on the head, petitioner stabbed him in the chest.

Maurice hit petitioner several times with the bat, and petitioner eventually was able to wrest the bat away from Maurice. Petitioner asserted at trial that before he had left the

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[2] Poole testified at trial that there was no knife on her bed.

apartment, he did not observe anything wrong with Maurice. He also testified that he did not recall having hit Poole with the bat.

C. Procedural History

On January 15, 1993, petitioner was charged in an indictment by a grand jury with one count of Murder in the Second Degree, two counts of Attempted Murder in the Second Degree, Assault in the First Degree, Assault in the Second Degree,[3] and Criminal Possession of a Weapon in the Fourth Degree. Due to a clerical error, the charge of Assault in the Second Degree that the grand jury had voted on was written in the indictment and submitted to the jury at trial as Assault in the First Degree.[4] The jury acquitted petitioner of the murder count, the attempted murder counts, and the weapon possession count relating to petitioner's possession of a baseball bat. The jury found petitioner guilty of Manslaughter in the First Degree, which was submitted to the jury as a lesser included offense of the murder count, both counts of Assault in the First Degree, and the weapon count relating to petitioner's possession of a knife.

On October 20, 1993, when petitioner was scheduled to be sentenced, he moved to set aside the verdict of first-degree assault on Linda Poole, on the ground that he had not been indicted for that offense. The trial court noted that the grand jury had voted to indict petitioner for second-degree assault in connection with his attack on Poole and that, by finding petitioner guilty of first-degree assault, the jury had necessarily found petitioner guilty of the charge of

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[3] One attempted murder charge and the first-degree assault charge related to the attack on Maurice. The other attempted murder charge and the second-degree assault charge related to the attack on Poole.

[4] This error was not discovered until sentencing.

second-degree assault. With the People's consent, therefore, the court modified the verdict of guilty of first-degree assault to a verdict of second-degree assault. The court then sentenced petitioner to consecutive terms of imprisonment of eight and one-third to twenty-five years on the manslaughter count, five to fifteen years on the first-degree assault count, and two and one-third to seven years on the second-degree assault count. The court also sentenced petitioner to a term of imprisonment of one year on the weapon possession count to be served concurrently with the other sentences.

On appeal, petitioner argued that (1) the trial court lacked jurisdiction to modify the verdict of first-degree assault regarding the attack on Poole to a verdict of second-degree assault; (2) the People had failed to disprove petitioner's defense of justification; (3) the People had failed to prove that Maurice Small had suffered serious physical injury; (4) petitioner was denied his right to be present at a pre-trial Ventimiglia hearing; (5) the trial court should have submitted Reckless Assault in the Third Degree to the jury as a lesser included offense of the first-degree assault count regarding Linda Poole; and (6) petitioner's sentences were excessive.

On August 5, 1996, the Appellate Division, Second Department, affirmed petitioner's judgment of conviction. People v. Ellis, 230 A.D.2d 751, 646 N.Y.S.2d 452 (2d Dep't 1996). The court held that petitioner had failed to preserve most of his arguments regarding the People's alleged failure to disprove his justification defense, and that the arguments in any event were without merit. Id. at 751. The Appellate Division also held that the trial court properly declined to charge Assault in the Third Degree as a lesser included offense of the first-degree assault count regarding Poole. Id. at 752. In addition, the court held that petitioner's remaining contentions were not preserved for appellate review, and did not address the merits of

those claims. Id. at 752. The New York Court of Appeals denied leave to appeal on December 5, 1996. People v Ellis, 89 N.Y.2d 921, 654 N.Y.S.2d 723 (1996).

D. This Petition For Federal Habeas Relief

Ellis petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2554. In his petition, he asserts that: (1) the trial court lacked jurisdiction to modify the verdict of guilty of first-degree assault regarding the attack on Poole to a verdict of guilty of second-degree assault; (2) the People had failed to disprove beyond a reasonable doubt petitioner's justification defense; (3) the People had failed to prove beyond a reasonable doubt that Maurice Small had suffered serious physical injury; and (4) the trial court should have submitted to the jury reckless Assault in the Third Degree as a lesser included offense of the first-degree assault count regarding Poole.

Discussion

A. The Exhaustion Requirement

Before a federal court may consider a petitioner's application for a writ of habeas corpus, the petitioner must have exhausted all available state judicial remedies. 28 U.S.C. § 2254(b); Picard v. Conner, 404 U.S. 270, 275 (1971); Taylor v. Mitchell, 939 F. Supp. 249, 253 (S.D.N.Y. 1996). The Second Circuit has established a two-pronged test to determine whether a petitioner has exhausted all available state remedies. First, he must have "fairly presented" his federal constitutional claims to the highest state court. Reid v.Senkowski, 961 F.2d 374, 376 (2d Cir. 1992); Daye v. Attorney General, 696 F.2d 186, 191 (2d Cir. 1982), cert. denied, 464 U.S. 1048 (1984). A petitioner fairly presents a claim when he informs the state court of both "the factual and the legal premise of the claim he asserts in federal court." Lebron

v. Mann, 40 F.3d 561, 567 (2d Cir. 1994) (quoting Daye, 696 F.2d at 191).

The second prong generally requires the petitioner to utilize all avenues of appellate review within the state court system before proceeding to federal court. Daye, 696 F.2d at 190; Bossett v. Walker, 41 F.3d 825, 828 (2d Cir. 1994) (quoting Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 1990), cert. denied, 514 U.S.1054 (1995)); Levine v. Commissioner of Correctional Services, 44 F.3d 121, 124 (2d Cir. 1995).

The exhaustion doctrine "requires only that a petitioner present his claim once on direct or collateral review." Sanford v. Senkowski, 791 F. Supp. 66, 69 (E.D.N.Y. 1992) (citing Udzinski v. Kelly, 734 F. Supp. 76, 81 n.4 (E.D.N.Y. 1990)); Fielding v. LeFevre, 548 F.2d 1102, 1106 (2d Cir. 1977). Therefore, even if a claim is not raised at trial or on direct appeal, a claim pursued throughout a full round of state post-conviction proceedings is exhausted. 2 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 23.3b, at 671 (1994) (citing Castille v. Peoples, 489 U.S. 346, 350-51 (1989)).

Previously, if a petition contained both exhausted and unexhausted claims the petition was dismissed. Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a federal district court now has discretion to deny a petition that contains both exhausted and unexhausted claims on the merits. 28 U.S.C. § 2254(b)(2).

B. The Procedural Default Jurisprudence

Apart from the exhaustion requirement, a federal court generally will be precluded from reviewing any claim for which "a state court rests its judgment on an adequate and independent state ground, including a state procedural bar." Reid v. Senkowski, 961 F.2d 374, 377 (2d Cir. 1992). A petitioner's failure to meet the state's procedural requirements for

presenting his federal claims "deprives the state courts of an opportunity to address those claims in the first instance." Coleman v. Thompson, 501 U.S. 722, 731 (1991). However, when a petitioner defaults his federal claims in state court, he meets the technical requirements for exhaustion because there are no longer any state remedies "available" to him. Id. at 732; 28 U.S.C. § 2254(b). Therefore, a federal court does not need to require that a federal claim be presented in state court if it is clear that the state court would hold the claim to be procedurally barred. Grey v. Hoke, 933 F.2d 117, 120 (2d Cir. 1991) (citing Harris v. Reed, 489 U.S. 255, 263 n.9 (1989)).

If a claim is procedurally barred, a federal court may review the claim only if the petitioner can show "cause for the default and prejudice attributable thereto, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 749-50 (quoting Murray v. Carrier, 477 U.S. 478, 485 (1986)); Keeney v. Tamayo-Reyes, 504 U.S. 1, 2 (1992). Cause exists if "the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray, 477 U.S. at 488 (1986); see Armadeo v. Zant, 486 U.S. 214, 222 (1988). For example, cause may be demonstrated by showing that (1) "the factual or legal basis for a claim was not reasonably available to counsel"; or that (2) "some interference by state officials made compliance impracticable"; or that (3) "the procedural default is the result of ineffective assistance of counsel." Bossett, 41 F.3d at 829 (quoting Murray, 477 U.S. at 488 (1986)). Prejudice exists if the outcome of the case would likely have been different absent the complained of constitutional violation. See Reed v. Ross, 468 U.S. 1, 12 (1984).

Respondent does not dispute that petitioner has satisfied the exhaustion

requirement. However, respondent contends that petitioner's claims that (1) the trial court lacked jurisdiction to modify the verdict of guilty of first-degree assault to guilty of second-degree assault; (2) the People failed to disprove beyond a reasonable doubt petitioner's defense of justification; and (3) the trial court should have submitted third-degree assault as a lesser included offense of first-degree assault with regard to the attack on Poole, are procedurally barred. Furthermore, respondent argues that petitioner has not and cannot show cause or prejudice for his default.

C. The Claim Regarding The Trial Court's Jurisdiction To Modify The Verdict

In support of his claim that the trial court lacked authority to modify the jury's verdict of guilty of first-degree assault to a verdict of guilty of second-degree assault, petitioner asserts that the trial court's modification was an impermissible amendment of the indictment because the grand jury had not voted to indict him for that offense. Moreover, he claims that the alleged error was jurisdictional and therefore non-waivable.

1. This Claim Is Procedurally Barred

Petitioner's claim is exhausted because it was raised on direct appeal to the Appellate Division and again in his application for leave to appeal to the Court of Appeals. However, it is procedurally barred because the Appellate Division rejected it on an adequate and independent state ground. On appeal, the Appellate Division explicitly stated that petitioner's "remaining contentions [were] not preserved for appellate review."[5] People v. Ellis, 230 A.D.2d at 752. As the Appellate Division never reached the merits of the claim, the court denied it

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[5] The Appellate Division did not address this claim directly, and therefore it was included among petitioner's "remaining"claims that were not preserved for appellate review.

solely on an adequate and independent state procedural ground. Moreover, the Court of Appeals, in denying petitioner's leave for appeal, affirmed the Appellate Division's decision without specifying the grounds upon which it was affirming. Therefore, both of the court decisions rested on an adequate and independent state ground and this claim is not preserved for federal habeas review. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (where the last reasoned opinion on a claim explicitly imposes a procedural default, it is presumed that a later decision rejecting the claim did not silently disregard that bar and consider the merits).

The claim is procedurally barred for the additional reason that petitioner never presented it as a federal constitutional claim to any state court. Petitioner presented the claim as a violation of the New York, not the United States, Constitution. Moreover, he cannot return now to state court in order to present the claim as a federal one. Therefore, the federal constitutional claim is deemed exhausted but procedurally barred. See Bossett, 41 F.3d at 828-29 (if state prisoner has not exhausted his state remedies with respect to a claim, but no longer has a state forum in which to raise it, it is procedurally barred), cert. denied, 514 U.S. 1054 (1995).

Because petitioner has not shown cause for his default or prejudice resulting therefrom, it is rejected. In any event, this claim is meritless.

2. Petitioner's Claim Is Meritless

At trial, petitioner's counsel explicitly stated that the trial court had the authority to modify the verdict of guilty of Assault in the First Degree to a verdict of guilty of Assault in the Second Degree relating to petitioner's attack on Linda Poole. Thus, petitioner has both waived and failed to preserve for appellate review his claims that the trial court lacked the

authority to modify the jury's verdict. See C.P.L. § 470.05[2]; People v. Ford, 476 N.Y.S.2d 783, 785, 62 N.Y.2d 275, 279 (1984) (claim that trial court erred in considering or submitting to the jury a lesser crime that arose out of the same criminal transaction as the indicted crime is waived unless defendant makes a timely objection); See People v. Udzinski, 146 A.D.2d 245, 251, 541 N.Y.S.2d 9, 13 (2d Dep't 1989).

Petitioner claims that the alleged error was jurisdictional and therefore non-waivable. The New York Court of Appeals has held that "an indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime." People v. Iannone, 45 N.Y.2d 589, 600 (1978). In this case, there is no dispute that the charge of second-degree assault, on which judgement was entered, was voted on by the grand jury and effectively charged petitioner with a crime.

Furthermore, the New York Court of Appeals held in Ford that the error of submitting to the jury a lesser crime that was not charged in the indictment and was not a lesser included offense, but did arise out of the same transaction as the charged crime, was not a jurisdictional error. Id. at 282-83. In this case, Assault in the Second Degree, the crime that the grand jury indicted petitioner for, is a lesser included offense of the crime of Assault in the First Degree, which was submitted to the jury. See N.Y. Penal Law §§ 120.05[2], 120.10[1]; People v. Felton, 141 A.D.2d 839, 840 (2d Dep't 1988) (second-degree assault, as defined by N.Y. Penal Law § 120.05[2], is a lesser included offense of first-degree assault, as defined N.Y. Penal Law § 120.10[1]). As the trial court stated, when the jury found petitioner guilty of first-degree assault, they necessarily found him guilty of second-degree assault. See People v. Udzinski, 146 A.D.2d at 254 ("[A]n indictment which charges a particular offense also charges all lesser crimes

necessarily included in that offense."). Because petitioner was both indicted and convicted of that lesser crime, his claim has no merit.

D. The Claim Regarding The Injury To Maurice Small

Assault in the First Degree requires that a victim suffer "serious physical injury," while Assault in the Second Degree requires a showing of "physical injury" to the victim.[6] N.Y. Penal Law §§10.00[9], [10]. Petitioner claims that the evidence presented at trial was legally insufficient to prove he caused serious physical injury to Maurice Small, and therefore the assault resulted in physical injury. He contends that (1) there was no evidence that the injury had been life-threatening because it did not occur to a vital area and had not even caused a momentary loss of consciousness; (2) the fact that the injury was painful when cold air blew on it and that Maurice felt some pain when he lifted heavy things did not establish "protracted impairment of health" as required by N.Y. Penal Law § 120.10[1]; and (3) the scar caused by the injury did not show serious disfigurement as required by the statute.

1. Procedural Bar

Petitioner's claim that the People failed to prove that Maurice Small suffered serious physical injury is procedurally barred because the Appellate Division held that it was not preserved for appellate review. People v. Ellis, 230 A.D.2d at 752. Petitioner did not claim at trial that there was insufficient evidence to prove that Maurice Small suffered serious physical

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[6] "Physical injury" means "impairment of physical condition or substantial pain." N.Y. Penal Law § 10.00[9]. "Serious physical injury" means "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." N.Y. Penal Law § 10.00 [10].

injury and thus failed to preserve that claim for appellate review. See C.P.L. § 470.05[2]; People v. Staunton, 190 A.D.2d 703, 593 N.Y.S.2d 534 (2d Dep't 1993). Moreover, the Court of Appeals affirmed the Appellate Division's decision without specifying the grounds upon which it was affirming. Therefore, both of the courts rejected the claim on an adequate and independent state ground.[7] See Ylst, 501 U.S. at 803.

Again, petitioner has not shown cause for his default or prejudice resulting therefrom. The claim is rejected on that ground. Moreover, as set forth below, this claim is without merit.

2. Petitioner's Claim Is Meritless

The People produced sufficient evidence at trial to reasonably lead a jury to conclude that Maurice Small suffered protracted disfigurement, protracted impairment of health, and protracted impairment of the function of a bodily organ, and thus suffered serious physical injury as defined by N.Y. Penal Law § 10.00[10].

At the time of the trial, approximately nine months after petitioner stabbed Small, a scar was clearly visible to the jury from the witness stand. This scar constitutes "serious or protracted disfigurement." See People v. Steven S., 160 A.D.2d 743, 744-45, 553 N.Y.S.2d 812, 813-14 (2d Dep't 1990) (stab wound to chin that required 50 stitches and left the scar visible to

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[7] Petitioner's claim is procedurally barred for the additional reason that he failed to raise the claim in his letter seeking leave to appeal to the Court of Appeals, and merely attached his appellate brief, which did contain that claim. The fact that petitioner attached his appellate brief is not enough to satisfy the exhaustion requirement. Deleon v. Hanslmaier, 94 CIV 5512, 1996 WL 31232, at *3 (E.D.N.Y. Jan. 19, 1996) (citing Grey v. Hoke, 933 F.2d 117, 120 (2d Cir. 1991)). As such, the court may not grant habeas relief on this ground. See 28 U.S.C. § 2254(b). However, because respondent did not raise this issue in its affidavit in opposition to the petition, I will exercise my discretion under 28 U.S.C. § 2254(b)(2), and address the merits of this claim.

the jury one and one-half years after the attack was considered "serious and protracted disfigurement").

Maurice also testified that he still experienced pain on the area of his left arm that had been injured when he tried to lift heavy things and when cold air blew on it. This testimony also supports the jury's determination that Small had suffered a "protracted impairment of the function of a bodily organ" and "protracted impairment of health." See N.Y. Penal Law § 10.00[10]; People v. Knapp, 213 A.D.2d 740, 741, 623 N.Y.S.2d 355, 356 (3d Dep't 1995) (evidence established serious physical injury when, among other symptoms, at time of trial, the victim was still suffering from headaches and pain in her face); People v. Romer, 163 A.D.2d 880, 880, 558 N.Y.S.2d 406, 407 (4th Dep't 1990) (evidence established serious physical injury when, among other symptoms, the victim was still suffering from headaches).

The evidence presented by the People with regard to Maurice Small's injury to his left arm was sufficient to prove beyond a reasonable doubt that he suffered serious physical injury. Accordingly, petitioner's claim has no merit.

E. The Claim Regarding The Justification Defense

Petitioner claims that the People failed to disprove beyond a reasonable doubt his justification defense with regard to his stabbing of Conward and Maurice Small, and that the jury's rejection of the justification defense was against the weight of the evidence. Specifically, petitioner asserts that even if he were an initial aggressor as to Linda Poole, that altercation had been completed and petitioner possessed no weapon when Conward, armed with either a shovel or a blackjack, and Maurice, armed with a baseball bat, threatened him with deadly physical force. Petitioner claims that he actually believed that physical force was necessary to protect

himself against Conward and Maurice and that the People failed to prove that this belief was not reasonable.

1. Procedural Default

Petitioner has exhausted this claim, as he presented it to the Appellate Division and again in his application for leave to appeal to the Court of Appeals. On direct appeal, the Appellate Division rejected all of petitioner's arguments with regard to his justification defense. People v. Ellis, 230 A.D.2d at 751. The court held that "most" of petitioner's "arguments in support of his contention that the People failed to disprove his justification defense beyond a reasonable doubt" were unpreserved for appellate review. 230 A.D.2d at 751. The court, however, continued, and found that the evidence presented "was legally sufficient to disprove the justification defense and to establish the defendant's guilt beyond a reasonable doubt." Id. The Court of Appeals, in denying petitioner's application for leave to appeal, affirmed the decision of the Appellate Division without specifying the grounds upon which it was affirming. People v. Ellis, 89 N.Y.2d at 921.

Habeas review is not prohibited "unless the state court rendering a judgment in the case "'clearly and expressly'" states that its judgment rests on a state procedural bar." Harris v. Reed, 489 U.S. 255, 263 (1989) (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)); See Reid v. Senkowski, 961 F.2d 374, 377 (2d Cir. 1992) (where a "state court did not clearly and expressly state whether it had examined the merits of [a federal claim] or had relied on a procedural default," the claim was "properly subject to federal habeas corpus review"). It is unclear which of petitioner's claims regarding his justification defense were rejected by the Appellate Division based on an adequate and independent state ground. For this reason, this

claim is subject to federal habeas review. Tankleff v. Senkowski, 135 F.3d 235, 247 (2d Cir. 1998) ("a procedural default does not bar consideration of a federal claim on habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar") (quoting Coleman, 501 U.S. at 735 (1991)); Thomas v. Scully, 854 F. Supp. 944, 951 (E.D.N.Y. 1994) ("[T]he Second Circuit Court of Appeals has been very strict in requiring a clear and express articulation of a state procedural bar in order for federal habeas review to be precluded.").

2. Merits

Although the Supreme Court has held that the Due Process Clause does not require the People to disprove an affirmative defense, see Patterson v. New York, 432 U.S. 197, 210 (1977), according to New York law, once a defendant raises the defense of justification, the prosecution bears the burden of disproving the defense beyond a reasonable doubt. See N.Y. Penal Law § 25.00[1] (McKinney 1997). Thus, the People had the burden of disproving petitioner's justification defense.

New York Penal Law § 35.15 states that a person who is the "initial aggressor" in an encounter cannot justifiably use physical force against another unless the initial aggressor "has withdrawn from the encounter and effectively communicated such withdrawal" to the other person, "but the latter persists in continuing the incident by the use or threatened use of unlawful physical force." Petitioner admitted at trial that, in grabbing Linda Poole and stabbing her with a knife, he was the initial aggressor. He claims, however, that even if he was the initial aggressor as to Poole, that altercation had been completed and he possessed no weapon when Conward

Small "threatened [petitioner] with deadly physical force." Appellate Brief at 41.[8] Petitioner claims that he "openly ended the altercation with Linda" and effectively communicated that withdrawal to the others "by not continuing the fight with Linda, by disarming himself, and by isolating himself near the kitchen." Appellate Brief at 42. He claims that it was only when Conward Small came towards him in the hallway that he returned to the kitchen and grabbed the knife because "he was afraid that Conward (who was holding either a shovel or a blackjack) and Maurice, who was carrying a baseball bat, were going to hurt him." Appellate Brief at 44. Therefore, petitioner claims, he actually believed that deadly physical force was necessary to protect himself against Conward and that his stabbing of Maurice was justified because "he only wanted to stop [him]." Appellate Brief at 45.

The prosecution offered ample evidence to negate, or at least disprove beyond a reasonable doubt, petitioner's claim of justification. Marietta Small testified that before Conward confronted petitioner, Poole had informed Conward that petitioner had stabbed her. At that point, Conward had reason to believe that petitioner continued to pose a threat to Poole and to the others in the apartment. All of the People's witnesses testified that, after his initial altercation with Poole, petitioner never communicated to the others in the apartment that he would refrain from imminently attacking her again. Marietta and Maurice both testified that Conward and Maurice approached petitioner very shortly after the initial attack on Poole and that petitioner never said anything about his intentions when he grabbed the knife and moved towards Conward and Maurice. Marietta also testified that Conward was standing in the hallway with his

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[8] "Appellate Brief" refers to the brief submitted by petitioner on direct appeal to the Appellate Division.

hands out to the sides to stop petitioner from going to the back of the apartment where Poole was at the time petitioner stabbed him. Moreover, Maurice testified that when petitioner stabbed him, he was trying to catch his falling father and his back was to petitioner and consequently he was not using or threatening the imminent use of physical force against petitioner.

A federal court cannot make credibility judgments about the testimony presented at a criminal trial. Fernandez v. Dufrain, 97 CIV 5995, 1998 WL 385506, at *11 (S.D.N.Y. June 30, 1998); Fagon v. Bara, 717 F. Supp. 976, 979 (E.D.N.Y. 1989). "A conviction will only be set aside on habeas review if no rational trier of fact could have found that the essential evidence of the crime were proven beyond a reasonable doubt." Vargas v. Hoke, 664 F. Supp. 808, 809 (S.D.N.Y. 1987) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Moreover, the evidence must be viewed in the light most favorable to the prosecution. Id. Based on the evidence presented, the jury could reasonably have concluded that the prosecution met its burden of disproving beyond a reasonable doubt petitioner's claim that he acted in self-defense when he stabbed Conward and Maurice Small.

F. The Claim Regarding The Jury Charge

Finally, petitioner claims that he was denied his statutory and constitutional due process rights when the trial court declined to submit to the jury a lesser included charge of reckless third-degree assault pursuant to a timely request by petitioner. He argues that (1) Reckless Assault in the Third Degree is a lesser included offense of the charged crime of Assault in the First Degree; and (2) there is a reasonable view of the evidence that petitioner did not intentionally cause physical injury to Poole, but rather recklessly and unintentionally caused her physical injury.

1. This Claim Is Exhausted

Petitioner met the exhaustion requirement with regard to this claim when he presented it both on direct appeal to the Appellate Division and in his application for leave to appeal to the Court of Appeals. The Appellate Division explicitly stated that "the trial court did not err in declining to charge the lesser-included offense of [third-degree assault] . . . since there was no reasonable view of the evidence which would support the submission of reckless assault to the jury under the circumstances presented." People v. Ellis, 230 A.D.2d at 752. The Court of Appeals affirmed the Appellate Division's decision without specifying the grounds upon which it was affirming. People v. Ellis, 89 N.Y.2d at 921. This Court agrees with the state appellate courts' determinations that petitioner's claim has no merit.

2. Petitioner's Claim Is Meritless

The Supreme Court has held that the Due Process Clause requires a trial court to submit jury instructions regarding lesser included offenses in capital cases. See Beck v. Alabama, 447 U.S. 625, 625 (1980). The Court, however, has expressly declined to decide whether this requirement exists in noncapital cases. Id. at 638, n.14. The Second Circuit has also yet to rule on this issue. See Rice v. Hoke, 846 F.2d 160, 164 (2d Cir. 1988); Knapp v. Leonardo, 46 F.3d 170, 179 (2d Cir.), cert. denied, 515 U.S. 1136 (1995) ("neither the Supreme Court nor this circuit has decided whether the failure to instruct a jury on lesser included offenses in noncapital cases is a constitutional issue that may be considered on a habeas petition"). Therefore, a decision that would interpret the Constitution to require submission by a trial court of jury instructions on lesser included offenses in noncapital cases would involve the "announcement of a new rule" which is precluded by the decision of the Supreme Court in

Teague v. Lane, 489 U.S. 288 (1989) (holding that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review); See Jones v. Hoffman, 86 F.3d 46, 48 (2d Cir. 1996).

Moreover, it is unnecessary for me to decide here whether the trial court's failure to give an instruction on a lesser included offense presents a constitutional claim because the trial judge correctly ruled that the evidence did not warrant an instruction of Reckless Assault in the Third Degree.

In the federal system, it has long been "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would rationally permit a jury to find him guilty of the lesser offense and acquit him of the greater." Keeble v. United States, 412 U.S. 205, 208 (1973). A trial judge must charge the jury on lesser included offenses when (1) it is theoretically impossible to commit the greater crime without committing the lesser; and (2) a reasonable view of the evidence would permit the jury to find that the defendant had committed the lesser, but not the greater, offense. Rice v. Hoke, 846 F.2d 160, 165 (2d Cir. 1988) (quoting Keeble, 412 U.S. at 208).

There was no reasonable view of the evidence presented at trial which would have warranted a finding that petitioner recklessly caused serious physical injury to Poole, rather than intentionally caused serious physical injury to her. Neither petitioner's testimony nor Poole's testimony provides an explanation for the stab wound to Poole's back that would support a finding of reckless, rather than intentional, conduct on petitioner's part. Moreover, since the trial court determined that there was sufficient evidence to support the lesser included second-degree

assault charge, it was not required to instruct the jury on the lesser included offense of third-degree assault. See Collins v. Irvin, 92 CIV 5157, 1995 WL 451022, at *3 (E.D.N.Y. July 19, 1995) (since "no reasonable view of the evidence would permit the jury to find that the defendant had committed the lesser, but not the greater offense," lesser included offense was not required); Tatta v. Mitchell, 962 F. Supp. 21, 24 (E.D.N.Y. 1997).

CONCLUSION

For the foregoing reasons, Ellis' petition for a writ of habeas corpus is denied. In addition, I hereby refuse to issue a certificate of appealability, since petitioner has not presented a "substantial showing of the denial of a constitutional right." See Reyes v. Keane, 90 F.3d 676, 680 (2d. Cir. 1996) (quoting Section 102 of the Antiterrorism and Effective Death Penalty Act).

So Ordered.

JOHN GLEESON
U.S. DISTRICT JUDGE

Dated: August 3, 1998
Brooklyn, New York